BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL G. BERGKAMP Claimant	)	
VS.	)	
DRYWALL SYSTEMS, INC. Respondent	)	Docket No. 1,017,241
AND	)	
CONTINENTAL WESTERN INS. CO. & **KANSAS BUILDING INDUSTRY WC FUND** Insurance Carrier	)	

ORDER

Respondent and its insurance carrier, Continental Western Ins. (Continental) requested review of the December 14, 2005 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board placed this matter on its summary docket on March 28, 2006.

APPEARANCES

Terry J. Torline, of Wichita, Kansas, represents the claimant. Kirby A. Vernon, of Wichita, Kansas, represents respondent and Continental. Roy T. Artman, of Topeka, Kansas, represents respondent and Kansas Building Industry Work Comp Fund (KBIWCF).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant an 88 percent permanent partial general disability based upon a 75.5 percent task loss and a 100 percent wage loss.

The respondent and Continental request review of the ALJ's finding with respect to both task and wage loss. They contend the task loss opinion rendered by Dr. Stein is flawed, in that it is based upon claimant's own recitation of his past jobs rather than his job tasks. Thus, respondent and Continental argue that only Dr. Mills' opinion, that of 51 percent, should be considered. They also maintain claimant failed to establish a good faith effort to find appropriate post-injury employment. Thus, the ALJ should have imputed a wage of $424.93 per week, leaving claimant with a 23 percent wage loss and a resulting 37 percent work disability.

Respondent and its subsequent carrier, KBIWCF, contend there is no dispute as to claimant's date of injury, March 12, 2004, and that as a result, KBIWCF has no responsibility in this matter and the ALJ's finding on that issue should be summarily affirmed.

Claimant urges the Board to affirm the ALJ's Award in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board finds the ALJ's Award should be affirmed in all respects.

Claimant sustained a compensable accident on March 12, 2004. He was treated conservatively, but was never able to go back to sustained employment for anything more than a day or two at a time due to his ongoing complaints of low back pain. There is no dispute that he has suffered a low back strain and has an annular tear in the last disk of his low back. The parties agreed to a 5 percent functional impairment and the sole issue for purposes of this appeal is the nature and extent of claimant's permanent partial general disability, better known as "work disability".

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of

> permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[3]

As for the wage loss component, the ALJ concluded claimant had demonstrated a good faith effort to find employment "[b]ased upon the totality of the evidence including [c]laimant's testimony as well as the vocational expert's testimony".[4] Because claimant met his burden to establish good faith, his actual wage loss, that of 100 percent was used for purposes of calculating his work disability. The Board likewise finds no reason to disturb this finding.

Claimant provided a list of the places where he sought employment in the only field in which he has recent experience, that of drywall. While it is uncontroverted that he can no longer perform physical labor in that industry, claimant can work as an estimator. And

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Id.* at 320.

[4] ALJ Award (Dec. 14, 2005) at 4.

he has repeatedly sought employment in that field, both with this respondent and various other potential employers in the surrounding geographical area.

Respondent suggests that claimant has improperly limited his employment prospects by only looking for work as an estimator or construction supervisor, both because it artificially limits his prospects and because he has no experience as a drywall estimator. Under these facts the Board is not persuaded by this argument. Respondent argues that while claimant has experience applying drywall, he has no experience as an estimator in that field and thus should not be looking for work exclusively in that field. While on the other hand, respondent suggests that claimant should seek out work as bench assembler, cashier, counter/rental clerk, parts salesperson or retail sales clerk, all positions for which claimant has no experience. This argument is significantly compromised by the lack of consistency. Moreover, the Board does not believe it was unreasonable for claimant to seek work as an estimator or construction supervisor in the 15 weeks between his release and up to the regular hearing. It may be that after a period of time claimant will - or should - come to the conclusion that his search criteria is too limited and that he should expand his inquiries. And the failure to do so would properly be the focus of a request to review and modify claimant's award. But at least as of the regular hearing, the Board is satisfied that claimant's efforts were made in good faith and that his actual wage loss should be used to calculate his work disability.

Finally, it is worth noting that claimant repeatedly requested vocational assistance from respondent and nothing was made available, including a job as an estimator, a position that was at least at one point available in respondent's organization. If claimant truly has the capacity to earn the sum suggested by respondent, thereby decreasing the wage loss, it would certainly benefit respondent to provide claimant with assistance in obtaining such a position.

Like the ALJ, the Board also finds claimant demonstrated a good faith effort to find appropriate post-injury employment. As such, the 100 percent wage loss finding by the ALJ is affirmed.

In this instance, two physicians expressed opinions as to claimant's task loss. Dr. Stein testified that claimant's task loss was 100 percent based upon a review of a document claimant prepared. Not surprisingly, this document was in a form that was unusual. Obviously, claimant had no experience preparing these documents but the Act does not prohibit such a practice.

Respondent and Continental contend this document does not analyze the individual job tasks and is really nothing more than a job listing. And because each of the jobs did, at some point, involve lifting items that now exceed his weight restrictions, respondent believes that is the reason the job is precluded by Dr. Stein. Nonetheless, Dr. Stein utilized this document in providing his opinion and appeared to have no difficulty applying the job descriptions to the restrictions he imposed.

In contrast, Dr. Mills testified that claimant's task loss was 51 percent based upon the vocational analysis offered by Steve Benjamin, a vocational specialist retained by respondent and Continental.

The ALJ was apparently not dissuaded by respondent's argument and merely averaged the two task loss opinions and assessed a 75.5 percent task loss. The Board has considered this issue and concludes there is no reason to disturb the ALJ's finding on task loss. Although claimant may not be as experienced in drafting task loss analyses as Mr. Benjamin, no one takes issue with the accuracy of his list of jobs. The issue is whether it accurately describes his work tasks. After examining claimant's document the Board finds that some of the respondent's criticisms regarding specific tasks may well be appropriate. But the statute does not define work tasks and the Board is hesitant to suggest that only retained experts can prepare task analyses for purposes of a work disability claim. Rather this is more a question of the weight of the testimony rather than one of admissibility.

Admittedly, Mr. Benjamin's report breaks down the claimant's individuals jobs into separate tasks but so too does claimant's report. For example, in his job as construction laborer, claimant identified 8 separate tasks while Mr. Benjamin identified 51 separate tasks. This is not a situation where the claimant merely identified the jobs he performed in the last 15 years but rather, like Mr. Benjamin, he identified the different jobs and broke down those jobs into tasks. The Board finds, after reviewing the two analyses offered by the parties that while there is a numerical difference in the ultimate number of tasks as between the two, there is not a vast difference such that one list should be disregarded over the other.

In addition, there are inconsistencies in the task loss of opinion of Dr. Mills. Dr. Mills testified that claimant should not lift over 100 pounds yet he testified that claimant is capable of performing certain tasks on Mr. Benjamin's task list that require lifting over 100 pounds. Given the problems identified with both task lists and the resulting task loss opinions, the Board finds it was appropriate to average the two opinions. Accordingly, the 75.5 percent task loss is affirmed.

All other findings and conclusions contained in the ALJ's Award are affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated December 14, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

Dissent

The undersigned Board Member respectfully dissents from the majority's opinion on the issue of task loss. This Board Member finds the claimant's task list sets forth a general description of claimant's jobs rather then breaking those jobs down into specific work tasks. Thus, I would find Mr. Benjamin's task list more persuasive and would compute claimant's work disability based upon the 51 percent task loss suggested by Dr. Mills. Accordingly, claimant has a 100 percent wage loss and a 51 percent task loss, which yields a 76 percent work disability.

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BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Kirby A. Vernon, Attorney for Resp. and Continental Western Ins. Co.
Roy T. Artman, Attorney for Kansas Building Industry Work Comp Fund
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director